

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

5/24
76-1125

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

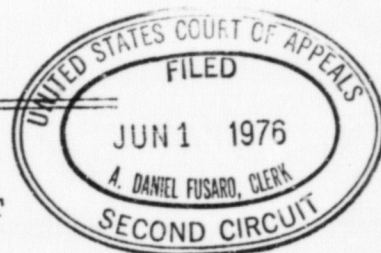
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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

WILLIE LEE UNDERWOOD,
Defendant-Appellant.
-----X

*B
AFS*
Docket No. 76-1125

SUPPLEMENTAL
BRIEF FOR APPELLANT



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
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Docket No. 76-1125
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WILLIE LEE UNDERWOOD, :
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Defendant-Appellant. :
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In Point I of Appellant's Main Brief it was argued that the calling of appellant -- already arrested and an actual "target" of the Grand Jury -- into the Grand Jury room prior to the expected arrival of his retained counsel violated appellant's Fifth and Sixth Amendment rights. On constraint of this Court's opinion in United States v. James, 493 F.2d 323 (2d Cir.), cert. denied, 419 U.S. 849 (1974), appellant also recognized that this unjustifiable violation of his constitu-

tional rights would not result in a dismissal of the indictment where the indictment was based upon other "sufficient, legal and probative evidence . . . , " United States v. James, supra, 493 F.2d at 326. Since the Grand Jury testimony did not appear to have been before the Hearing Court on the motion to dismiss the indictment, we urged a remand to give the Court an opportunity to examine the Grand Jury minutes.

Subsequent to the filing of appellant's brief, the Office of the United States Attorney afforded appellate counsel access to the exhibits before the Grand Jury and to that portion of the Grand Jury testimony that was disclosed to trial counsel pursuant to the Government's obligations under 18 U.S.C. §3500.

After examining these materials, appellant is constrained to conclude that the evidence before the Grand Jury, apart from appellant's testimony, was sufficient to support the indictment. Since no purpose would be served by having the district court pass on an issue the resolution of which is preordained, we withdraw our request for a remand to the district court on this issue. We are also forced to recognize that, assuming the validity of this Court's holding in James, supra, appellant is not entitled to dismissal of the indictment, despite the patent violation of his Fifth and Sixth Amendment rights.

However, in James, this Court viewed the denial of the defendant's right to consult with counsel "with concern and disapproval" and cautioned "against repetition of such conduct."

493 F.2d at 326 n.4. From the facts of this case, it would appear that this Court's warning in James merits repetition.* We respectfully suggest that this Court, if it wishes, employ this case to reiterate the caution expressed in James.

CONCLUSION

For the above-stated reasons, appellant withdraws his request, contained in Point I of Appellant's Main Brief, that the case be remanded to the district court for a hearing to examine the Grand Jury minutes.

Respectfully submitted,

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* The issue of an actual target defendant's right prior to and during his appearance before the Grand Jury has assumed added importance in light of the Supreme Court's recent decision in United States v. Mandujano, 44 U.S.L.W. 4629 (No. 74-754, May 19, 1976) which held that the failure to give Miranda warnings to a putative target before the Grand Jury conferred no immunity for a witness who subsequently committed perjury. Four of the eight Justices who participated in the decision in Mandujano went further, expressing the view that Miranda warnings need not be given to a target defendant and that, since Mandujano's Sixth Amendment right to counsel had not attached, the defendant had no right to counsel inside the Grand Jury room. However, a majority of the Court has not yet passed upon these significant issues. Moreover, in this case, unlike Mandujano, appellant was already arrested on suspicion of having committed the crime for which he was subsequently indicted.

CERTIFICATE OF SERVICE

May 26, 1976

supplemental

I certify that a copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

David P. Gottlieb